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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 56 56

SARAH O'DONNELL, Administratrix of the Estate of WILLIAM O'DONNELL, Deceased,
Petitioner,

vs.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,
Respondent.

Petition for Rehearing

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PETITION FOR REHEARING.

Notwithstanding the fact that for more than fifty years since its enactment there has been no change in the explicit language of the coupler provision of the Safety Appliance Act (27 Stat. 531):

> "Sec. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

although in every case which reached this court either for decision[1] or by petition for certiorari[2], this Court had gone no farther than to hold that the fact that a coupler broke while in use "at most presented a question for the jury"[3] whether the Safety Appliance Act had been violated, this court now for the first time holds that the statute

> "requires couplers which, after a secure coupling is effected, will remain coupled until set free by some purposeful act of control."

Not only is this conclusion reached by less than a majority of the members of this court, but to pose the issue for decision, it is necessary to change the theory of negligence, upon which the plaintiff pleaded and presented her case in the trial court and argued it in both reviewing courts, to a theory of non-negligence and to ignore altogether the theory upon which the defendant tried its case: that the decedent was not killed in the movement in which the couplers broke, so that any conceivable error in the instructions as to the effect of the coupler breaking was wholly harmless. But the decision of this Court goes beyond merely affording this widowed plaintiff a chance

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[1] **New Orleans etc. R. Co. v. Scarlet**, 249 U. S. 528; **Minneapolis etc. R. Co. v. Gotschall**, 244 U. S. 66; **St. Louis & San Francisco R. Co. v. Conarty**, 238 U. S. 243, 250; **Chicago B. & Q. R. Co. v. United States**, 220 U. S. 559, 571; **Louisville & Nashville R. Co. v. Layton**, 243 U. S. 617; **Johnson v. Southern Pacific Co.**, 196 U. S. 1, 18.

[2] **Western & Atlantic R. R. v. Gentle**, 58 Ga. App. 252, 198 S. E. 257; **Vigor v. Chesapeake & O. Ry. Co.** (C.C.A. 7), 101 F. 2d 865, 869. See 305 U. S. 654; 307 U. S. 635.

[3] **New Orleans etc. R. Co. v. Scarlet**, 249 U. S. 528; and see **Cochran v. Pittsburgh & L. E. R. Co.** (D.C. Ohio), 31 F. 2d 769, 771. Twenty years ago, Mr. Robert, the author of the authoritative text in this field, referred to this as "the true rule to be deduced from the cases." Robert, Federal Liabilities of Carriers (2nd Ed., 1929), § 620.

to try her case again upon another theory and, although no error is asserted in the submission of the defense of causation to the jury, to test that defense again. In extending the mandatory duty to provide couplers "which will couple automatically by impact and which can be uncoupled without the necessity of men going between the ends of the car" to include couplers which "will remain coupled until set free by some purposeful act of control" this court is guilty of legislating judicially, in violation of the doctrine of separation of powers contained in Article 1, section 1 of the Constitution, and the holding that the jury should be peremptorily so instructed not only denies this defendant the benefit of the jury's verdict in its favor on the issue of causation but also denies carriers in these Safety Appliance Act cases the right to trial by jury as guaranteed by the Seventh Amendment. We submit the implications of this decision go so far as to require a rehearing and a determination by a full court.

I.

The legislative history and the language of the statute, as construed for more than fifty years by the agencies charged with its enforcement demonstrate that the mandatory duty imposed by the statute relates solely to coupling and uncoupling functions.

This Court construes the Safety Appliance Act to require "couplers which, after a secure coupling is effected, will remain coupled until set free by some purposeful act of control" because if construed "to require that cars be equipped with appliances which couple automatically by impact and which may be released without going between the ends of cars, but which need not remain coupled in the meantime" the Act "would guard against dangers incident to effecting an engagement or disengagement

while ignoring the even greater hazards which can result from the failure of a coupling to perform its main function, which is to stay coupled until released." However great the danger of a coupler defect "which sets cars running uncontrolled upon its tracks", we think it is clear that Congress left the issue of liability for such a defect to be determined by the principles of common law negligence; the legislative history of the coupler statute, the language chosen by Congress to express its intent and the construction which the Act has received since its enactment compel the conclusion that it was only the "dangers incident to effecting an engagement or disengagement" with which Congress was concerned in enactment of the statute. Over and over again the sponsors of the statute referred to the fact that experience had shown that the greatest single source of accidents to railroad employees was in coupling and uncoupling cars equipped with the old-fashioned link and pin couplings or with various types of automatic couplers which would not couple with other types and it was to guard against this class of accidents that Congress imposed upon carriers the absolute duty to provide uniform, automatic couplers which would not require the men to go between the ends of the cars.

The movement for the passage of legislation requiring automatic couplers began with the first national convention of State Railroad Commissioners in March, 1889, which unanimously adopted a resolution urging the Interstate Commerce Commission "to consider what can be done to prevent the loss of life and limb in coupling and uncoupling freight cars used in interstate commerce." President Harrison, in his annual message to Congress in 1889, called the attention of Congress to this resolution and urged Congress to pass legislation "to require

uniformity in the construction of cars." 21 Cong. Rec. 90. Again in his annual message in 1890 he asked for "uniformity in couplers." 22 Cong. Rec. 7. In his annual message in 1891 President Harrison referred specifically to the fact that he had twice urged legislation to avoid the "cruel and largely needless sacrifice" of 369 brakemen killed and 741 maimed while engaged in coupling cars out of a total of 2,451 killed and 22,390 injured during the year ending June 30, 1889. 23 Cong. Rec. Finally in his annual message of 1892, President Harrison said (24 Cong. Rec. 13):

> "In renewing the recommendation which I have made in three preceding annual messages that Congress should legislate for the protection of railroad employes against the dangers incident to the old and inadequate methods of braking and coupling which are still in use upon freight trains, I do so with the hope that this Congress may take action upon the subject. Statistics furnished by the Interstate Commerce Commisssion show that during the year ending June 30, 1891, there were forty-seven different styles of car couplers reported to be in use, and that during the same period there were 2,660 employes killed and 26,140 injured. Nearly 16 per cent of the deaths occurred in the coupling and uncoupling of cars, and over 36 per cent of the injuries had the same origin."

The Interstate Commerce Commission had been making similar recommendations in its annual reports to Congress. In its annual report for the year 1891, the Commission referred to the same resolution of the State Railroad Commissioners and to resolutions adopted the following years making the same recommendation. The Commission set forth fully the statistics of accidents to railroad employees, showing that in 1890, 15.05 per cent of the deaths and 35.02 of the injuries to railroad em-

ployees (the largest single class of accidents) "were caused by coupling and uncoupling cars", concluding that "fully 90 per cent of the lives lost and injuries incurred through coupling and uncoupling cars could have been avoided by the use of a uniform automatic coupler." Pointing out that in addition to the old link and pin coupling there were 37 different styles of automatic couplers in use, the Commission said:

> "The justice of the demands of the railroad employes for uniformity in safety appliances, more particularly in car couplers, can not be questioned and can better be appreciated when the difficulties, which the trainmen encounter daily and hourly in coupling and uncoupling cars, is understood. Under existing conditions when there are so many couplers in use it is impossible for men to know before going between the cars whether they have the ordinary links and pins to couple together, or two different types of the large variety of couplers now in use. No matter what coupler is used, no matter how perfect its mechanism and working, if it does not couple as well and as freely with every other coupler now in use as it will with another coupler of its own make, it is to that extent, a death trap. What the railroad employes of the country demand is uniformity. They want all couplers alike, and they are men whose lives and persons are at stake, for with about a million freight cars in use the change to any particular coupler must cause a great injury to their number and loss of life in bringing it about. This great element of uncertainty, coupled with the danger to life and limb in consequence of such uncertainty should be remedied so that trainmen when coupling and uncoupling cars may know that the couplers will be of the same type." 5th Annual R. Inter. Com. Comm., 1891.

In its report the following year the Commission called attention to legislation which had been proposed "to re-

quire the railroads to select or decide upon some standard coupler, uniform height of draw bar and other methods of insuring uniform safety appliances" and said (6th Annual R. Inter. Com. Comm. 1892, 69, 70):

> "It should not be lost sight of that the end to be attained is uniformity in railway safety appliances.
>
> "Statistics show that the number of deaths and injuries among railway employes, occurring for the most part in coupling freight cars and falling from trains, is yearly increasing in this country, not only in the actual number of casualties, but in proportion to the number of employes engaged in the service. That these casualties are largely due to lack of uniformity in couplers and other appliances there can be no doubt."

The debates in Congress show very clearly that the purpose of Congress was to require uniform automatic couplers in order to guard against the unnecessary hazards incident to coupling and uncoupling cars because of non-uniform and non-automatic coupling devices. Senator Cullom, who was in charge of the bill in the Senate said:

> "* * * we simply desire a uniform coupling that will be adopted by the common carriers of the whole country so that the laboring men engaged in the operation of the cars and trains shall be protected in their lives and limbs as far as possible when they undertake to couple cars together. That is all we desire. * * *" (24 Cong. 1249.)

Later referring to the companion provision of the statute providing for a uniform height of draw bars, Senator Cullom said:

> "Perhaps the cause of the greatest loss of life to employees operating railroad cars is the difference in the height of cars which they have to couple. The employees go into the yard in the dark and are required to go between the cars to couple them. A man

so situated cannot tell what kind of car is coming to him to be coupled with the car by which he is standing.

"If it happens to be a car that will couple to the one to which he desires to attach it he is not hurt, but if it happens to be a car the draw bar of which is 2 or 3 inches below or 2 or 3 inches above that of the other car when the two come together the man is crushed.

"That is one of the important reasons why something must be done if we have any regard for human life in carrying on Interstate Commerce." 24 Cong. Rec. 1250.

On the following day continuing the argument, Senator Cullom said:

"Then as to the second section of the bill, that section has reference only to what are usually called automatic couplings. *It was the intention and purpose of the committee,* and I think it is carried out in substitute, *to simply require a uniform coupler,* the testimony showing that such a coupler must be put in use by direction of the National Government in order to protect the lives of the people operating the trains, taking care of the cars, coupling them etc." 24 Cong. Rec. 1273. (Emphasis supplied)

In support of his argument Senator Cullom referred to the statistics for the years 1888 to 1891, showing that more than 15 per cent of the railroad employees killed during those years and from 33 to 37 per cent of those injured were killed or injured in accidents which occurred while coupling or uncoupling cars. The statistics also showed that the next largest class of accidents were to trainmen who fell from the trains while setting hand brakes. 24 Cong. Rec. 1274. Later he continued:

"*The purpose of the committe in this bill is simply to provide for a uniform coupler* and for an air

brake about which there shall be no particular controversy. When we get the cars of this country equipped with uniform couplers and with air brakes *so that men will not be required to get between the cars,* so that men who are on top of the cars today will be taken off and thereby relieved of the danger from such positions, there will be no occasion for further legislation on the subject, in my judgment." 24 Cong. Rec. 1287. (Emphasis supplied)

In the debates on February 10, 1893 other Senators referred to the old link and pin couplings and to the practical necessity of men getting in between the ends of the cars in order to couple and uncouple them and various amendments were offered which reflected views of the several Senators. 24 Cong. Rec. 1417-1426.

At no time in the debates in Congress was any other purpose stated than that of securing uniform and automatic couplers to eliminate the hazards incident to coupling and uncoupling cars and always the emphasis was upon couplers which were uniform and automatic so that switchmen were not obliged to go between the ends of the cars. Never was there any reference to any necessity to impose a mandatory duty to provide "safe" or "secure" couplers. The language which Congress selected—"couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars"—was obviously selected because it precisely fitted the situation which Congress had in mind. In Section 4 of the same bill Congress imposed the requirement of "secure grab irons or hand holds." Certainly if Congress had intended to require couplers which would "remain coupled until set free by some purposeful act of control" the language of this much discussed statute would have required "secure couplers" or some such language as "couplers coupling

automatically by impact, which will remain coupled, and which can be uncoupled without the necessity of men going between the ends of the cars." But there is no suggestion whatever in the legislative history of this bill which affords any support whatever to the intention which this Court now for the first time imputes to Congress.

The construction of the statute by the Interstate Commerce Commission which was charged by law with the details of its enforcement and by the courts, further confirms the fact that it was the intention of the Congress in passing this statute to protect the lives and safety of the men engaged in coupling and uncoupling operations by requiring uniform and automatic couplers and not to provide generally for "secure" couplers or "safe" couplers or "efficient" couplers as Congress had done in other provisions of the Safety Appliance Act with respect to other appliances.

Following the enactment of the statute both the Interstate Commerce Commisson and this Court showed very clearly their understanding that the purpose of the statute only was to guard against dangers incident to coupling and uncoupling cars by requiring uniform and automatic couplers. The Interstate Commerce Commission in its 7th annual report said: (7th Annual R. Inter. Com. Comm. 1893, 76)

> "For a considerable portion of the time necessary to effect the changes in equipment required by the law, a reduction of the number of casualties to railway employes, especially those which result from coupling cars, can hardly be hoped for. Experience has shown that dangers incurred in coupling cars are likely to continue while new devices are from time to time being introduced, owing to lack of uniformity.

"It will be observed that the law does not in any way restrict the use of automatic couplers to any particular type or types, and therefore it can hardly be open to the objection urged against it that it would especially benefit a particular patentee.

"In the matter of couplers *the aim of the law is that the men shall not be required to go between cars in order to couple or uncouple them,* and therefore a road must not only equip its freight cars with couplers that are interchangeable, but can not use upon its line the cars of other roads which do not automatically couple with their own." (Emphasis supplied)

Later, commenting on the first of the court decisions in cases arising under the statute, particularly *Johnson* v. *Southern Pacific Co.* (C.C.A. 8) 117 Fed. 462, the Commission said (16th Annual R. Inter. Com. Comm. 1902, 61):

"* * * If this ruling should be upheld on appeal it would have the effect of nullifying a *main object of the statute,* which *is to secure such uniformity in applied automatic coupling devices as to permit all cars in a train to be coupled and uncoupled without requiring men to go between the cars* The act in terms prohibits any carrier from hauling or permitting to be 'hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.' Carriers are left free by the statute to use any kind of automatic coupler they see fit, *the sole and governing restriction being that,* whatever kinds of coupler may be used, *no cars shall be hauled or used on the line which do not couple automatically by impact, or can not be uncoupled without men going between the cars;* and this applies to the hauling of all cars, whether owned by the carrier operating the road or by other carriers." (Emphasis supplied)

The *Johnson* case came before this Court at the October, 1904 term. *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1. This Court reviewed at length the legislative history which we have set forth above and concluded: (196 U. S. at 19)

> "*The risk in coupling and uncoupling was the evil sought to be remedied,* and that risk was to be obviated by the use of couplers actually coupling automatically. True, no particular design was required, but whatever the devices used they were to be effectively interchangeable. Congress was not paltering in a double sense. And its intention is found 'in the language actually used, interpreted according to its fair and obvious meaning.' *United States* v. *Harris,* 177 U. S. 305, 309.
>
> "That this was the scope of the statute is confirmed by the circumstances surrounding its enactment, as exhibited in public documents to which we are at liberty to refer. *Binns* v. *United States,* 194 U. S. 486, 495; *Holy Trinity Church* v. *United States,* 143 U. S. 457, 463." (Emphasis supplied)

We do not contend that liability under the statute is limited to men injured while coupling or uncoupling cars; the contrary has long since been settled. We do contend, however, that the language which Congress used, considered in the light of the purpose which Congress was seeking to obtain demonstrates that the only mandatory duty which Congress imposed on carriers was to provide cars with uniform and automatic couplers in order to reduce the heavy toll of accidents in coupling and uncoupling operations. Under the guise of "construing" the statute this Court is not justified some other mandatory duty in order to serve some other purpose.

Minneapolis and St. Louis R. Co. v. *Gotschall,* 224 U. S. 66, is not "anticipatory" of the construction now placed by this Court for the first time upon the fifty-seven

year old coupler statute. While it is true that the court in that case used "the vocabulary of negligence" it would have been a very simple matter indeed for the court to have said that the breaking of the coupler was *conclusive* evidence of negligence rather than that "negligence might be *inferred* from the mere opening of the couplers." That this Court in the *Gotschall* case did not mean to hold what the Court now says it did is made clear by its decision two years later in *New Orleans etc. R. Co.* v. *Scarlet*, 249 U. S. 528, relied upon by the respondent in its brief and argument here, but not referred to in the Court's opinion. In the *Scarlet* case the precise question was before this Court: whether "the mere breaking of a king pin and coupling chains shows conclusively that they were defective" and thereby conclusively established a violation of the Safety Appliance Act, the particular provision there relied upon being the mandatory duty imposed by the Boiler Inspection Act, that the parts and appurtenances of a locomotive be "in proper condition and safe to operate in the service to which same are put • • • without unnecessary peril to life or limb." 45 U.S.C.A. §23. This Court held that the fact that the coupler broke "did not establish as a matter of law that the king pin or the chains were defective; "at most, it presented a question for the jury," citing the *Gotschall* case. The two opinions read together show clearly that this Court did not "anticipate" any construction of the explicit language of the coupler statute extending the mandatory and absolute duty imposed by the statute beyond coupling and uncoupling without men exposing themselves to unnecessary risk of injury by going between the ends of the cars.

However great the dangers incident to the breaking of a coupler, we submit that the legislative history of the statute, the announced purpose of the sponsors of

the legislation and the language which Congress "actually used, interpreted according to its fair and obvious meaning" compel the conclusion that the only purpose intended to be accomplished by the Act was to guard against the dangers incident to coupling and uncoupling cars equipped with non-uniform and non-automatic couplers. For more than fifty years that has been understood to be the purpose of the statute and the sole measure of the absolute liability imposed by its terms. For more than fifty years Congress has seen fit not to extend the scope of the statute although in companion statutes it has used terms such as "secure," "efficient," "in proper condition and safe to operate," etc. For this Court to broaden the statute's explicit language by judicial construction merely because this Court feels that some additional purpose should be served or some other danger should be guarded against is to legislate judicially. We submit that every principle of statutory construction forbids the interpretation which this Court has placed on the coupler statute. As four members of this Court said in *Urie* v. *Thompson* 337 U. S. 163:

> "• • • due regard for the limits of judicial interpretation precludes such free-handed application of a statute to situations outside its language and its purpose."

II.

To give a peremptory instruction in this case is to deny the right to trial by jury.

For the past decade and more, this Court has insisted that is the function of the jury to pass upon disputed questions of negligence and liability in these Federal Employers' Liability Act cases. *Wilkerson* v. *McCarthy*, 366 U. S. 53; *Lavendar* v. *Kurn*, 327 U. S. 645; *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29. The same prin-

ciples have been applied in actions under the Safety Appliance Act and the related provisions of the Boiler Inspection Act. (45 U.S.C.A. §§ 1, *et seq.*) *Myers* v. *Reading Co.*, 331 U. S 477; *Penn v. Chicago & N. W. Ry. Co.*, 335 U. S. 894; *Lilly* v. *Grand Trunk W. R. Co.*, 317 U. S. 481, *Urie* v. *Thompson*, 337 U. S. 163. In the *Myers* case, this Court held it was for the jury to determine from the failure of the brake to function on one occasion whether the brake was "efficient." The same rule was applied in the *Penn* case, where the uncoupling lever did not operate on the first application. In the *Lilly* and *Urie* cases the question for the jury was whether the ice on the tender, or the condition of the sanders, violated the mandatory duty to keep the locomotive "in proper condition and safe to operate."

In the present opinion this Court goes beyond these cases and holds that the malfunction of the coupler, although not within either of the functions specifically required by the statute, nonetheless entitles the plaintiff to a peremptory instruction that to equip a car with a coupler which broke in the switching operation was a violation of the Act." But if it is for the jury to determine whether an icy footing on the deck of a tender or a "bad order" sander was "in proper condition and safe to operate," or whether a brake which does not hold is "efficient" or whether a coupling lever which does not operate upon the first application is one which permits the cars to become "uncoupled without going between the ends of the cars," certainly it was for this jury to determine whethed this coupler which broke complied with the statute.

In the cases cited by this Court as holding that "failure of couplers to remain coupled until released constitutes or evidences a violation of the Act," as we pointed out

at pages 21 to 23 of respondent's brief, the question in dispute, whether the breaking of the coupler was a violation of the Act or was the proximate cause of the accident *was submitted to the jury in each instance.* Not one of those cases approves a peremptory instruction for the plaintiff. This Court has repeatedly condemned the giving of peremptory instructions in these cases and emphasized "the importance of preserving for litigants in F.E.L.A. cases their right to a jury trial." See *Wilkerson* v. *McCarthy, supra.*

To take from the jury the issue whether this coupler measured up to the standard prescribed by the statute is to deny this defendant, a litigant in an F.E.L.A. case, its right to a trial by jury just as much as a peremptory instruction for the defendant deprives a plaintiff of a jury trial. The duties imposed by the Safety Appliance Acts are absolute; the command of the statute is in each instance mandatory; but whether the appliance or the equipment complies with the mandate of the statute is properly a question for the jury. To deprive carriers of their right to have the issue determined by a jury is as much the deprivation of a constitutional right as is a directed verdict for the defendant in a disputed question of statutory violation or common law negligence.

Finally, we submit this Court should not deprive this defendant of its jury verdict merely because this Court feels the plaintiff should have tried her case upon another theory. Plaintiff tried her case as a negligence action, but she cannot complain of that. Only by stripping plaintiff's claim of all aspects of negligence does this Court bring into focus the issue upon which the verdict of the jury is set aside. Not only did the plaintiff fail to submit either by way of requested instructions to the trial court or by way of argument to the jury the theory of non-negligence upon which this Court predicates its

decision, but the defendant did not defend on the converse of this Court's theory. This case was tried upon the sole issue whether the decedent was killed in the movement upon which the coupler broke, or in the final movement out of the yard. Successively each court has held unanimously that this issue was properly submitted to the jury. The verdict of the jury could have been based only on the issue argued before it. Certainly the verdict should not be set aside for the reason that if the plaintiff had pleaded and presented her case upon an entirely different theory she would have been entitled to different instructions upon the effect of the coupler breaking than she requested at the trial, when the jury obviously found that the breaking of the coupler had nothing to do with the accident.

PRAYER.

The respondent respectfully prays that in order to correct this Court's misapprehension of the purpose and scope of this statute, and to insure, rather than to deny, the right to trial by jury of the issues in this case, a rehearing should be granted and the judgments below affirmed.

Respectfully submitted,

HARLAN L. HACKBERT,
Attorney for Respondent.

Certificate of Counsel.

The undersigned counsel for respondent hereby certifies that the foregoing petition is presented in good faith and not for delay.

Harlan L. Hackbert